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Supreme Court, U.S.
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No. 05-1643

In the

Supreme Court of the United States

JOHN P. HAMMER,
on Behalf of Himself and
All Others Similarly Situated,

Petitioner,

v.

CITY OF EUGENE, OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Does the Takings Clause of the Fifth Amendment to the United States Constitution require that government make findings establishing an essential nexus and rough proportionality between an exaction and the alleged impact of a proposed use or development of private property at the time of the imposition of said exaction?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner John P. Hammer.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. For thirty years, PLF has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before the United States Supreme Court on four occasions representing individuals whose rights to use their property was unlawfully denied by government agencies. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF has participated as amicus curiae in nearly every other major takings case before the United States Supreme Court in the past quarter century. *See, e.g., Kelo v. City of New London, Connecticut*, 125 S. Ct. 2655 (2005); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

PLF filed a brief below on behalf of Petitioner in *Hammer v. City of Eugene*, 121 P.3d 693 (Or. Ct. App. 2005). PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

Petitioner John P. Hammer applied to the City of Eugene (City) for a minor partition of his property. *Hammer*, 121 P.3d at 694. The application was approved, with a condition that Hammer dedicate portions of his property to the City of Eugene. *Id.* Hammer sued the City for damages and injunctive relief in a class action lawsuit alleging takings of private property in violation of both the Takings Clause of the Fifth Amendment to the United States Constitution and the Oregon Constitution. *Id.*

The City did not make any findings to indicate the constitutionally required proportionality between the dedication of land and the impact of the partition on public facilities; the City instead sought to do so only after it was sued. *Id.* at 695-96. The court of appeals concluded that nothing in this Court's precedents, or in the Takings Clause itself, required the City to make findings supporting the land-use exaction *before* it was imposed on Hammer. *Id.* at 698. It held that the City's *post hoc* explanations were constitutionally adequate. *Id.* The Oregon Supreme Court denied review of the court of appeals' decision. *Hammer v. City of Eugene*, 132 P.3d 28 (Or. 2006).

SUMMARY OF ARGUMENT

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), explain *what* government must do to ensure that an exaction is constitutional under the Takings Clause. But the decisions do not say *when* government must do it. A resolution of this question is important for at least three reasons.

First, the issue implicates a fundamental constitutional right: the right under the Takings Clause to use and develop private property free from unconstitutional exactions. While the Court has accorded prophylactic protection to other fundamental constitutional rights—such as those embodied in

the First and Fourth Amendments—the Court has yet to make clear that property rights enjoy the same protection.

Second, the last several decades have seen a substantial growth in the use of exactions by municipalities across the country to finance public improvements. A decision of this Court in this case would impact thousands of municipalities and many more property owners.

Third, the exactions process is currently plagued by a lack of clarity and fairness. Municipalities, property owners, and the courts do not know how the *Nollan* and *Dolan* tests should be implemented—specifically, when government must make findings in support of an exaction. The absence of standards has created a perverse incentive for government to postpone the required *Nollan/Dolan* analysis until after it is sued; it has spawned costly litigation between governments and property owners; and it has left those property owners who cannot afford legal counsel at the mercy of unjustified—and often illegal—exactions.

ARGUMENT

I

THIS CASE IMPLICATES THE FUNDAMENTAL RIGHT TO PRIVATE PROPERTY AND WHETHER IT SHOULD BE ACCORDED THE SAME PROTECTION AS OTHER FUNDAMENTAL RIGHTS

A. This Case Involves the Right to Use and Enjoy Property, Which Is a Fundamental Right

This case involves the question of whether the right to use and enjoy property—long-considered a fundamental individual right—should receive the same protection as the other fundamental rights. Without the Court's resolution of this question, property rights risk being "relegated to the status of a

poor relation" to other fundamental rights protected in the Bill of Rights, which is a result that this Court expressly rejected in *Dolan*. *Dolan*, 512 U.S. at 392.

"Property rights, and particularly rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States." David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 39 (2000). As Judge Janice Rogers Brown has observed, "[t]he idea that property ownership is the essential prerequisite of liberty has long been a fundamental tenet of Anglo American constitutional thought." *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting) (internal citation and quotation marks omitted)). "The protection of property rights secures and augments personal freedom." Bernard H. Siegan, *Property and Freedom* 9 (1997).

Given the historical importance in this country of property rights, it is not surprising that the Bill of Rights "is very much a property-oriented document." Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 118-19 (2001) (observing that numerous clauses in the Bill of Rights, including the Takings Clause, "shield[] from federal intrusion those property interests of most concern in [the constitutional] period: one's home, land, office, firearms, and financial resources"). The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795), the Court declared that the right of property is one of the "natural, inherent, and unalienable rights of man." In *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829), the Court declared that the right of "private property should be held sacred." In the more recent case of *United States v. James*

Daniel Good Real Prop., 510 U.S. 43, 61 (1993), the Court recalled "an essential principle: Individual freedom finds tangible expression in property rights." In *Dolan*, the Court explained:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan, 512 U.S. at 392.

In sum, there is no question that the right to use and develop private property is a fundamental one. This Nation's constitutional and political traditions, its Bill of Rights, and its jurisprudence leave no room for doubt that property rights are on par with other fundamental rights. As this case shows, however, the question remains whether property rights will be accorded the same level of protection as other fundamental rights.

B. This Case Gives the Court the Opportunity to Make Clear That Property Rights Are Not a "Poor Relation" to Other Fundamental Rights

The Takings Clause, like the other provisions of the Bill of Rights, sets out a general principle unaccompanied by instructions as to how to implement that principle. One legal scholar noted that "constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate." David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988). Thus, the courts have adopted rules designed to implement the protection of various fundamental rights, thereby reducing the risk that such rights will be violated in the first place. *Id.* at 208.

In the area of First Amendment law, Professor Strauss observes that this Court's "requirement of clear standards

reduces the danger that speech will be suppressed unlawfully." *Id.* at 197 (analyzing *Lovell v. City of Griffin, Georgia*, 303 U.S. 444 (1938)). In *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 150-51 (1969), this Court reaffirmed this principle when it held that a "law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."

Also, the Court has articulated a prophylactic rule for the Fourth Amendment's guarantee against unreasonable searches and seizures. U.S. Const. amend. IV. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court affirmed that the government ordinarily may not conduct searches and seizures without first obtaining a warrant of probable cause; *post hoc* justifications for a search and seizure are nearly always constitutionally inadequate, and evidence obtained without a warrant is typically inadmissible. *Id.* at 655. Similarly, this Court created the prophylactic *Miranda* rule to protect the individual's Fifth Amendment right against self-incrimination. Statements that are procured before *Miranda* warnings are given are generally inadmissible. *Miranda v. Arizona*, 384 U.S. 436 (1966).

While property rights are just as fundamental as these other rights enshrined in the Bill of Rights, property rights have not been accorded the same level of protection. Together, *Nollan* and *Dolan* set out substantive requirements of the Takings Clause applicable to exactions cases: Government must demonstrate an essential nexus and rough proportionality. However, beyond these substantive requirements, the decisions of this Court provide little guidance as to how to implement *Nollan* and *Dolan*. Must government make the required findings at the time an exaction is imposed? Or can it cobble together a *post hoc* rationalization for an exaction, when it becomes necessary to defend a lawsuit?

In other words, this Court has not yet accorded property rights the same *prophylactic* protection as other fundamental rights. As this case demonstrates, government currently has the choice either to justify an exaction before it is imposed or to create *post hoc* rationalizations for the exaction after it is sued. There is no reason to relegate property rights to the status of a "poor relation," and this case presents this Court with the opportunity to make clear that property rights *are* entitled to the same sort of prophylactic protection as any other fundamental right in the Bill of Rights.

II

THE ISSUE PRESENTED IN THIS CASE HAS A PROFOUND IMPACT ACROSS THE COUNTRY

A resolution of the question of when government must make *Nollan/Dolan* findings can have a substantial impact on the way thousands of municipalities and many more property owners pursue and process land use applications on a daily basis across this country. The use of exactions is "more than a local and isolated phenomenon." *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from the denial of certiorari). "Over the past three decades, increasing numbers of local governments . . . have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) (book review); *see also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

A 2000 General Accounting Office survey of United States cities with a population of 25,000 or more concluded that

approximately 60% of those cities use monetary exactions to fund the infrastructure necessary for new development. Vicki Been, *Impact Fees and Housing Affordability*, *in* 8 *Cityscape: A Journal of Policy Development and Research* 139 (William R. Zachmann ed., 2005), *available at* http://www.huduser.org/periodicals/cityscpe/vol8num1/cityscapev8num1.pdf (last visited Aug. 22, 2006). The use of exactions has noticeably increased in the last several decades. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1524 (2006). In 1957, only 20% of total locally derived funds came from charges, assessments, and other fees. *Id.* at 1585 n.49 (citing U.S. Census Bureau, U.S. Dep't of Commerce, *1957 Census of Governments, Vol. 4, No. 3, Historical Summary of Governmental Finances in the United States* 22 Table 6 (1958)). By 1997, these exactions made up 38% of locally derived revenues—i.e., an increase of 18%. U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Census of Governments, Vol. 4, No. 5, Government Finances* 2 Table 2 (2005), *available at* http://www.census.gov/prod/2005pubs/gc024x5.pdf (last visited Aug. 22, 2006). Some scholars have argued that, in reaction to *Nollan* and *Dolan*, "local governments have . . . impos[ed] a greater number of legislative exactions." Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 452 (2005).

There are two principal reasons why municipalities increasingly have turned to exactions as a method of financing public projects. First, general taxes—historically, the primary source for public financing—have fallen out of favor with the voting public. *See, e.g.*, Cal. Const. art. XIIIA, §§ 1-4 (provision that California voters added to their constitution and that severely limits the ability of local governments to impose property taxes). As one commentator has put it,

> Because tax increases are so politically unpopular, many states turned to development exactions. For

> example, to deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development, from subdivisions to strip malls.

Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. Cooley L. Rev. 1, 2 (2005).

Second, municipalities have used exactions to finance public projects simply because they can, with little to no resistence. The use of exactions against individual property owners as a way of financing public projects enjoyed by everyone in the community is very popular. Rosenberg, *supra*, at 262 ("Residents now urge their elected officials to adopt impact fees when the locality has not yet done so."). "Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option." *Id.* Moreover, exactions are often imposed on developers, who accept them without a fight, because they can easily pass on the costs to individual property owners. *Id.* at 204 n.93.

Given the growing and widespread use of exactions, it is vital that this Court clarify how the requirements of *Nollan* and *Dolan* are to be implemented. A decision of this Court on this issue would resolve an unsettled question of law that impacts governments and property owners across the country on a daily basis.

III

THIS CASE CAN HELP TO CLARIFY AND TO RESTORE FAIRNESS TO THE EXACTIONS PROCESS

The process by which government imposes exactions on property rights lacks clarity and fairness. Without guidance as to how to implement *Nollan* and *Dolan*, it is no wonder that disputes regularly arise about government's failure to justify exactions. *See, e.g., Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004) (example where government made no *Nollan/Dolan* findings prior to imposing exaction). It is also no wonder when government takes advantage of the absence of standards to postpone the required *Nollan/Dolan* analysis until it is taken to court, only to find out later that the exaction at issue bears little relation to the proposed use of the property. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 881 (1991) (reporting evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction").

A case that amicus recently litigated in the State of California illustrates why this Court must provide guidance to municipalities, property owners, and the lower courts about how *Nollan* and *Dolan* are to be implemented. In *Ahmad v. City of Elk Grove*, No. 05CS01760 (Sacramento Super. Ct. filed Dec. 22, 2005), the plaintiffs purchased a two-acre corner lot in the rural section of the City of Elk Grove, California, where they planned to build a home for themselves and their child. The City of Elk Grove required that, in exchange for a building permit, they pay a $240,360 fee for public improvements and dedicate a six-foot landscape easement along one side of their property. As an alternative to paying the fees, the City required the plaintiffs to sign a "deferred improvement agreement,"

whereby the plaintiffs would agree to pay an unspecified amount of money to the City, for unspecified public projects, in some unspecified time in the future. The City supplied no explanation, much less *Nollan/Dolan* findings, to justify the exactions. The unexpected—and unexplained—exactions put the plaintiffs in a financial bind, so the plaintiffs commenced legal action.

The plaintiffs were required to go through a lengthy administrative appeal within the City before filing suit in court. At each of the various steps of the administrative appeal process, the plaintiffs requested *Nollan/Dolan* findings justifying the exactions. The City refused to provide findings. However, after the first of two administrative hearings, the City eliminated the easement requirement and reduced the fees by almost $100,000. The City stood firm on the remaining fees after the final administrative hearing. At no time during the entire administrative appeal process did the City ever address the plaintiffs' legal arguments regarding the lack of a nexus and rough proportionality under *Nollan* and *Dolan* between the fees and the impact of their single-family home on public facilities.

The plaintiffs filed suit in state court, requesting a declaration that the remaining fees were unconstitutional and for an injunction requiring the imposition of fees that are proportional to the impact of a single-family home. Within months, and shortly before the date on which its response was due, the City adopted a temporary emergency ordinance. The ordinance drastically reduced the fees for a very small area of the City—including the area in which the plaintiffs' property happened to be located. Under the ordinance, the plaintiffs were required to pay only $9,500 for their right to build a home.

As this and other cases show, *e.g.*, *Town of Flower Mound*, 135 S.W.3d 620, municipalities can easily impose exactions without justifying them as required by *Nollan* and *Dolan*. A municipality currently has the incentive under federal

law to put off making *any* findings in support of an exaction until the property owner sues. By the time the municipality does undertake the required *Nollan/Dolan* analysis in the midst of litigation, it could conclude that its exaction was unjustified after all—a conclusion costing the parties and the courts both time and money. Until government knows *how* to implement *Nollan/Dolan*, the land-use exactions process will continue to be plagued by a lack of clarity and fairness. This case presents this Court with the opportunity to articulate clear standards as to when *Nollan/Dolan* findings must be made.

CONCLUSION

Nollan and *Dolan* went a long way toward protecting property rights by requiring government to make findings that support exactions imposed on landowners. But these cases left open the fundamental question of how to apply their standards: When must government make their *Nollan/Dolan* findings? With the ever-increasing and widespread use of exactions in this country, and the current lack of direction as to how to implement *Nollan/Dolan*'s findings requirement, it is imperative that this question be resolved now. The petition for writ of certiorari should be granted.

DATED: August, 2006.

Respectfully submitted,

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